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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WILLIAM ROBERT MAXWELL NORRIE et al., Plaintiffs and Appellants, v. SHEILA LANE et al., Defendants and Respondents.	B196062 (Los Angeles County Super. Ct. No. YC054968)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

The Law Office of Greg May and Greg May for Plaintiffs and Appellants.

Hogan & Hartson, Richard L. Stone and Elizabeth A. Moriarty for Defendants and Respondents.

This is an appeal from an order of dismissal after the trial court sustained a demurrer without leave to amend[1] in an action challenging the sale of an asset of a limited liability company. We conclude the complaint fails to state a cause of action against the buyer, and that there is no reasonable possibility appellant can amend to state a cause of action. We affirm the order of dismissal.

FACTUAL AND PROCEDURAL SUMMARY[2]

In 2002, Jeffrey Lane and William Robert Maxwell Norrie formed Highview Investments, Inc., a limited liability company formed for the purpose of acquiring and developing "high end" single family homes. Under the original operating agreement, Norrie was designated the sole managing member, and received a 40 percent interest in the company for directing the affairs and day-to-day activities of the business. Lane was essentially an investing silent partner, with a 60 percent interest in the business.

Highview acquired five properties, 913 Highview and 637 Sixth Street (the Manhattan Beach properties), 201 Circle Court and 2104 Circle Drive, Hermosa Beach, (the double lots), and 445 Manhattan Avenue, Hermosa Beach (445 Manhattan).

Pursuant to the operating agreement, Norrie took charge of the development of the two Manhattan Beach properties. In the spring of 2003, Lane became aware that both projects were significantly behind schedule and over budget. He asked Norrie for detailed information about the bills and the loans. Norrie was not forthcoming with the

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[1] Appellant also had filed an appeal from the order denying his motion for appointment of a receiver. The two appeals were consolidated under case No. B196062. In his opening brief, appellant explains that he "does not press his appeal" from the order denying appointment of a receiver, "in recognition of the difficulties that would be faced by any receiver appointed after the winding up of the company for which the receiver was sought." We thus treat that order as a final adjudication of the issues raised and decided.

[2] We draw our facts in part from the March 2006 written decision in the arbitration which resolved a portion of the dispute between Norrie and Lane.

information or the requested documentation. Lane sought joint management, but Norrie refused.

In August 2004, Lane sued Norrie for breach of contract and fraud, alleging serious deficiencies in Norrie's management of the projects. The parties settled the matter in September 2004, and entered into an Amended and Restated Operating Agreement (AROA) to govern the operation of Highview Investments.

The AROA provided that Norrie and Lane would act as co-managers of the day-to-day business of the company. Their duties included identification of properties to be acquired by the company, and the negotiation, acquisition, development and disposition of the properties. Lane was given sole responsibility for maintaining the company's books and records. He was authorized to open and reconcile the company's bank account, and was given authority to sign all checks under $10,000 after review and approval by Norrie; checks over that amount required the signature of Lane and Norrie.

The AROA provided that in the event the co-managers were unable to reach a mutually agreeable course of action, Lane would be the tie-breaker on all issues other than design. In addition, "the consent of only a majority of the Members, based upon their respective Percentage Interest [i]n the Company, shall be required for the removal of NORRIE as the Managing Member in the event the Managing Member commits an act of fraud, reckless or intentional misconduct, deceit or a knowing violation of the law."

At the time the AROA was executed, Highview owned the Manhattan Beach properties and the double lots, and was in the process of purchasing 445 Manhattan. Schedule A of the AROA showed that for all five properties, Lane was to receive 60 percent of the profits and Norrie 40 percent. It also showed that Lane was to bear 60 percent of the losses and Norrie 40 percent as to the Manhattan Beach properties, but that Norrie would bear 100 percent of the losses as to the double lots and 445 Manhattan. The AROA also contained an arbitration clause.

After execution of the AROA, Highview completed the purchase of 445 Manhattan. The Manhattan Beach properties were sold at a combined net loss of $92,270. The double lots were sold for a net profit of $1,379,000.

Lane was dissatisfied with Norrie's conduct as co-manager of Highview. In January 2005, Lane sought to remove Norrie as a managing member of Highview based on reckless misconduct, as provided under the AROA. Norrie refused to acknowledge his removal. Lane filed an action against Norrie (*Lane v. Norrie* (Super. Ct. L.A. County, 2007, No. BC328068)) seeking an order designating Lane as the sole managing member of Highview and removing Norrie as a managing member.

Lane then filed a demand for arbitration pursuant to the AROA. He sought an order removing Norrie as co-managing member based on fraud, reckless or intentional misconduct, deceit, or a knowing violation of the law; he also sought damages (the profits Norrie had estimated) on the Manhattan Beach properties, an order that Norrie would not share in the profits from the double lots, and an order allowing Lane to retain the only interest in 445 Manhattan.

A four-day arbitration was conducted by the Honorable Charles S. Vogel (Ret.), pursuant to the JAMS Comprehensive Arbitration Rules & Procedures. On March 3, 2006, the arbitrator issued a final award, providing:

"(1) Claimant Jeffrey Lane is denied rescission of the 2004 Amended and Restated Operating Agreement and the recovery of any damages.

"(2) It is declared that Respondent Robert Norrie was and remains removed as a 'Managing Member' pursuant to [¶] 6E of the 2004 Amended and Restated Operating Agreement of Highview Investments. He shall have no management or administrative authority in the business and operation of Highview Investments, Inc. L.L.C.

"(3) 44[5] Manhattan Avenue, Hermosa Beach, California is owned by Highview Investments, Inc. L.L.C. If profits are realized from the sale or development and sale of the project, Jeffrey Lane and Robert Norrie shall share in such profits at the ratio of 60% for Lane and 40% for Norrie.

"(4) Respondent Robert Norrie is entitled to a credit for capital contributions of $31,353.31 on 445 Manhattan Avenue project and $21,325 on the 637 Sixth Street project.

"(5) Claimant Jeffrey Lane is ordered to adjust and reconcile the books and records of Highview Investments, Inc. L.L.C. to reflect the determinations of this Award or, in the alternative, petition the Arbitrator to reopen this Arbitration to conduct an accounting.

"(6) Respondent Norrie's request for a dissolution is denied.

"(7) Each party is to pay his own fees and costs."

The parties stipulated to have the arbitration award confirmed without a hearing. On April 6, 2006, the trial court entered judgment confirming the arbitration award.

In late April 2006, Lane listed 445 Manhattan for sale, and notified Norrie of the listing price. In a letter to Norrie's attorney dated July 14, 2006, Lane's attorney noted that 445 Manhattan "was initially listed at $2,199,000, per Mr. Norrie's own suggestion to Jane Sager [the realtor], to initiate a 'bidding war.' It has been reduced in two week increments, is presently listed at $1,799,000, and has yet to receive a bid. Mr. Lane will continue to lower the price until the property is sold." The letter also set out expenses that had been incurred with regard to the property, and concluded that even if the property sold at the current asking price, there would be a net loss on the project.

On August 10, 2006, Norrie moved for appointment of a receiver (the receiver proceedings) to require Lane to comply with the judgment entered on the arbitration award. He also sought an order of contempt against Lane. In his moving papers, Norrie argued that a receiver was necessary to complete the sale, or development and sale, of 445 Manhattan, and to distribute the proceeds of the sale and all of Highview's remaining money in accordance with the AROA and the judgment. He asserted that Lane's failure to develop 445 Manhattan and his willingness to sell the property at a loss, coupled with his plan to make Norrie responsible for 100 percent of the losses, constituted a breach of fiduciary duty to Highview and to Norrie. He asserted numerous irregularities in Lane's accounting.

Lane opposed the motion, explaining that he had explored options for development or sale of the property, and had decided to sell. He explained he had listed the property at $2,199,000, and reduced the price several times because there were no

offers. Finally, on August 4, 2006, he received an offer of $1,729,000. He put in a bid for $1,739,000, the other bidder raised his offer to $1,750,000 with contingencies, and Lane raised his offer to $1,751,000. There were no other bids, and Lane expected the sale to close on September 18, 2006.

In reply, Norrie argued that Lane was in breach of his fiduciary duty to both Highview and Norrie in selling the property to himself rather than developing it on behalf of Highview. He asserted Lane had an interest in buying the property for himself at the lowest price, which was in conflict with his fiduciary obligation to sell the property on behalf of Highview and Norrie. Norrie argued that "once Lane had decided to bid for the property himself, to fulfill his fiduciary duty to Highview and Norrie, Lane should have arranged for the sale to be a blind auction supervised by a disinterested third party."

Lane was ordered to provide a more detailed accounting. Lane submitted a statement of compliance with the court's order. After hearing argument, the court denied the motion to appoint a receiver. The court also denied Norrie's motion for an order of contempt for Lane's failure to comply with the judgment, finding that Lane "has not failed to abide by the terms of the arbitration award." Norrie appealed from this order.

While that appeal was pending, Norrie, individually and on behalf of Highview, brought a separate action (*Norrie v. Lane* (Super. Ct. L.A. County, 2007, No. YC054968)) against Lane's wife, Sheila Lane (Sheila) and Highview. Sheila, rather than Lane, had been the buyer of 445 Manhattan. Norrie sought to set aside the sale as a fraudulent transfer, alleging that Sheila had conspired with Lane to enable him to breach his fiduciary duty to Highview to develop the property. He also alleged Sheila conspired with Lane to act as a straw buyer so that it would appear that a third party, rather than Lane, was developing 445 Manhattan.

Sheila demurred, and the trial court sustained the demurrer without leave to amend. Norrie appealed from the order of dismissal, and the appeal was consolidated with his earlier appeal from the denial of his motion for appointment of a receiver. In his opening brief, Norrie expressly abandons the earlier appeal.

DISCUSSION

I

"An appellate court reviews a ruling sustaining a demurrer without leave to amend de novo, exercising independent judgment on whether a cause of action has been stated as a matter of law." (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We treat the demurrer as admitting all material facts pleaded, and consider matters which may be judicially noticed. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) When the demurrer is sustained without leave to amend, we decide if there is a reasonable possibility the defect can be cured by amendment; if it can, the trial court has abused its discretion in denying leave to amend. The burden of proving the defect can be cured by amendment is on the plaintiff. (*Ibid.*)

On appeal, Norrie expressly acknowledges that he "does not contend that the complaint alleges facts sufficient to state a claim for the *captioned* causes of action for fraudulent transfer or conspiracy." Instead he argues he has stated a cause of action for aiding and abetting a breach of fiduciary duty. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599.) The existence of a fiduciary duty is a question of law; whether that duty has been breached is a question of fact. (*Ibid.*)

Norrie alleged that he was a member and Lane was the managing member of Highview at the time the complained-of acts took place. "The fiduciary duties a manager owes to the limited liability company and to its members are those of a partner to a partnership and to the partners of a partnership." (Corp. Code, § 17153.) Norrie sufficiently alleged that Lane had a fiduciary duty to Highview, and to him.

What Norrie has not, and cannot allege, is that Lane's sale of 445 Manhattan to Sheila constituted a breach of Lane's fiduciary duty. Corporations Code section 16404[3] sets out the fiduciary duties of a partner, and under Corporations Code section 17153, of a managing member of a limited liability company. These duties include: refraining from dealing with the conduct of the partnership business as or on behalf of a party having an interest adverse to the partnership and discharging the duties to the partnership and the other partners and exercising rights consistently with the obligation of good faith and fair dealing. (Corp. Code, § 16404, subds. (b)(2) and (d).)

Norrie's theory is that Lane's fiduciary duty required him to develop 445 Manhattan for Highview's benefit, and that Lane instead sold the property to Sheila, concealed the sale from Norrie until it was too late to prevent it, and then demolished the building in order to develop the property for himself and Sheila.

But under subdivision (e) of Corporations Code section 16404, "A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." And a partner may transact business with the partnership, and as to each transaction, the rights and obligations of the partner "are the same as those of a person who is not a partner, subject to other applicable law." (Corp. Code, § 16404, subd. (f).) There was no blanket prohibition against Lane purchasing 445 Manhattan from Highview, either personally or through Sheila.

More importantly, Norrie specifically challenged the propriety of the sale of 445 Manhattan in the receiver proceeding, was denied relief on the merits, and is now collaterally estopped from relitigating the issue.

In his motion seeking appointment of a receiver, Norrie claimed numerous improprieties in Lane's allocation of profits, losses, and legal fees between them. He argued: "Without any means to control the sale of 445 Manhattan and without the ability

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[3] Lane presents Delaware authority because Highview is a Delaware limited liability company. But the AROA, which governs the subject matter of this action, calls for application of California law, which we follow.

to require Lane to account to him as required under the Judgment, Norrie stands before this Court asking that 1) a third party receiver be appointed to complete the sale of, or develop and sell, 445 Manhattan, and then distribute the proceeds of that sale and all remaining cash available for distribution as the AROA and the Court's Judgment dictates as represented here by Norrie, and that 2) this Court hold Lane in contempt for violating the terms of this Court's Judgment, and allow Norrie to seek appropriate punitive damages."

In his opposition to the motion, Lane explained that as a sole managing member of Highview, he had explored various options for the development and sale of 445 Manhattan, and had decided to sell this property. He recounted the original listing price of $2,199,000, the subsequent price reductions, and the lack of offers until August 4, 2006, when he received an offer of $1,729,000. "I then personally put in an offer of $1,739,000 for 445 Manhattan. Then, the other bidder raised his offer to $1,750,000 with many contingencies. I exceeded that bid with an offer of $1,751,000. There were no bids from any other buyers, including Norrie." The sale was expected to close on September 18, 2006.

In reply, Norrie argued that, "In selling the property to himself, Lane has by his own action confirmed Norrie's charge that by not developing 445 on behalf of Highview, Lane is in breach of his fiduciary duty to both Highview and Norrie." He asserted that "Lane had a direct conflict of personal interest versus fiduciary obligation regarding the purchase and sale of 445. Lane had an interest in buying the property for himself at the lowest price he could get, as well as an obligation in selling the property at the highest price on behalf of Highview, and specifically Norrie, as '*the other party.*' [¶] Knowing the exact amount of the highest 'other bid' allowed Lane to offer only marginally more tha[n] what the other party had bid, rather than what he might have been willing to bid, given the future profitability of the development, had he not been aware of the amount of the competing bid, or who that competing bid was from. If a sale was necessary at all, which Norrie contends is not the case, once Lane had decided to bid for the property

himself, to fulfill his fiduciary duty to Highview and Norrie, Lane should have arranged for the sale to be a blind auction supervised by a disinterested third party."

The trial court ordered Lane to provide a detailed itemized list explaining the costs in the accounting, and continued the matter. Lane submitted a statement of compliance with the court's order, noting that 445 Manhattan had been sold and that Norrie had been provided with a full accounting.

Norrie submitted a supplemental brief in which he asserted that Lane, with sole control of Highview, failed to develop 445 Manhattan, "then waited to list the undeveloped property for sale until after Highview's realtor had opined the market had weakened." Lane then bought the property for himself to develop, rather than acting in the utmost good faith for the benefit of the other party, as a fiduciary should.

In the supplemental brief, Norrie argued that "[b]y purchasing 445 and knowing that, when it comes to Highview, Lane has so far acted in his own best interest and not in Norrie's, we can assume that Lane anticipates making a profit from developing 445. Therefore, by selling 445 on behalf of Highview without developing it for Highview, Lane is first immediately in breach of his fiduciary duty to Norrie, and secondly, has effectively manufactured a loss on 445 by making Highview pay for the $166,996 in development costs Highview has already paid. Lane knows he won't have to deduct those development costs from his future profits. Already, Lane's development of 445 will be $166,996 more profitable for him than it would have been had Lane developed it within Highview on behalf of Highview, PLUS he won't have to pay Norrie 40% of the profits from the development had it been developed by Highview. Plus, with Lane's twisted interpretation of the AROA, he has stuffed Norrie with 100% of the development costs left payable by Highview. [¶] Lane is certainly not acting with the 'utmost good faith for the benefit of' Norrie, and has in fact knowingly and deliberately harmed Norrie in the amount of the $166,996 in development costs, along with his 40% share in unspecified future development profits. Norrie asks that the Court order to [*sic*] penalize Lane to the fullest extent of the law to punish him for engaging in this scheme to defraud Norrie, and asks the Court to order Lane to reimburse Highview the full amount of the

development costs, or in the alternative, pay Norrie directly for the share of development costs Lane seeks to make Norrie pay (currently 100% of them.)"

In denying the requested relief, the court explained that Norrie's motion was largely based on an interpretation of paragraph 11F of the AROA governing Lane's right to seek additional recovery for losses from Norrie, and whether legal fees incurred by Highview, which was not a party to the arbitration, are to be borne entirely by Highview or in part by Lane. "These issues were not conclusively determined in arbitration and therefore cannot be a proper basis upon which to appoint a receiver because there is no 'judgment' regarding those issues to 'carry into effect' pursuant to CCP § 564 (b)(3)."

The arbitration award and ensuing judgment defined managing member Lane's obligations with respect to 445 Manhattan: he was to sell, or develop and sell, the property, and distribute the proceeds in accordance with the AROA. Norrie's motion for appointment of a receiver and for an order of contempt expressly challenged Lane's conduct in selling the property to himself, asserting it was a breach of Lane's fiduciary duty. The parties placed before the court detailed information about the conduct of the sale and the distribution of proceeds. The court rejected Norrie's claim, concluding that Lane did not violate the judgment by his sale of 445 Manhattan: "The court finds that Plaintiff has not failed to abide by the terms of the arbitration award. Accordingly, Defendant's motion for an order of contempt pursuant to CCP §§ 681.010 (e) and 717.010 for Plaintiff's alleged failure to comply with the court's judgment is also denied."

As we noted, Norrie abandoned his challenge to this order and it is now final. By claiming that Sheila aided and abetted Lane's breach of fiduciary duty by purchasing the property, Norrie is again attempting to challenge the propriety of the sale as a breach of fiduciary duty, despite the final order in the receiver proceeding necessarily rejecting that claim. Collateral estoppel bars relitigation of specific issues actually litigated in an earlier proceeding and necessarily decided adversely to the party against whom the doctrine is asserted. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 531.) In light of the final order in the receiver proceeding, Norrie cannot establish the underlying

breach of fiduciary duty necessary for a claim of aiding and abetting a breach of fiduciary duty.

II

Norrie also asserts he could amend his complaint to state a claim for interference with contractual relations. For such a claim, a plaintiff must plead "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

The subject contract Norrie relies on is the AROA, and he may be able to allege that Sheila had knowledge of the contract.[4] But under the terms of the contract, which he includes in his complaint, he cannot allege an actual breach or disruption of the contractual relationship.

Under the AROA, Norrie and Lane were to act as co-managing members of Highview. Norrie was subject to removal as a managing member for fraud, misconduct or deceit, by "a majority of the Members, based upon their respective Percentage Interest" in the company. The arbitration and ensuing judgment affirmed Lane's removal of Norrie as a managing member. Thus, Lane was the sole managing member, with authority to direct the affairs of the company, bind the company, execute agreements on behalf of the company, "and otherwise make all decisions on behalf of the Company."

But Norrie disputes Lane's right to sell 445 Manhattan under the AROA, based on the language which immediately follows: "However, the consent of all of the Members shall be required in connection with: . . . (5) the disposition of all or substantially all of the Company's assets, . . ." Since 445 Manhattan was the last remaining property owned by Highview, he argues that its sale required the consent of all members, not just Lane as the sole managing member.

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[4] Whether he can prove that allegation is not relevant at this stage of the proceeding.

The AROA addresses resolution of an impasse: the co-managing members "shall attempt to resolve all disputes in good faith." If after thorough discussion they cannot reach agreement on the course of action, "(i) On issues regarding design, design implementation, finishes, desirability, marketing, pricing, price reductions, final sales price and other terms and conditions of sale regarding [the five properties] Jane Sager will be the tie-breaker. Sager's decision shall be binding on the Co-Managing Members. [¶] (ii) On all other issues, Lane will be the tie-breaker."

Assuming Norrie and Lane disagreed about whether 445 Manhattan should be sold, Lane had the authority under this provision to break the tie and decide to sell the property. He listed the property for sale with Jane Sager, who was given tie-breaking authority under the AROA for pricing, price reduction, and final sales price and conditions of sale for Highview. Given that the AROA gave Sager and Lane authority to make decisions with regard to the sale of Highview properties, and that 445 Manhattan was sold by Sager and Lane, Norrie is unable to allege, and does not argue, that the sale of that property breached the tie-breaking provisions of the AROA. He cannot state a cause of action for interference with contractual relations.

Norrie argues his complaint states a cause of action for breach of the covenant of good faith and fair dealing. But the covenant of good faith and fair dealing does not prohibit a party from doing that which is expressly permitted by an agreement. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.) The AROA expressly provided that in the case of an impasse, Lane had authority to break the tie. Assuming there was an impasse as to the sale of 445 Manhattan, Lane did not violate the covenant of good faith and fair dealing by making the decision on behalf of Highview.

III

Finally, Norrie asserts that even if his personal claims were precluded by the receiver proceeding, his derivative claims on behalf of Highview would still remain because Highview was not a party to that proceeding. But where the party against whom preclusion is sought is in privity with the party to the former proceeding, collateral

estoppel will apply. (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1520.)

For purposes of collateral estoppel, "due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875.) In this case, Norrie, as one of two members of Highview, aggressively pursued his claim against Lane in the receiver proceeding. He argued that Lane had breached his fiduciary duties as the managing member by selling 445 Manhattan rather than allowing Highview to develop the property, an action which essentially ended Highview's business activities. There was a community of interest between Norrie and Highview. To the extent one of the members challenged the other member's management of Highview, the company would reasonably and necessarily expect to be bound by the outcome of the litigation between its two members. The derivative claims are precluded by the final order in the receiver proceeding.

Norrie has failed to demonstrate that his complaint can be amended to state a cause of action. The trial court did not abuse its discretion in sustaining the demurrer without leave to amend and dismissing the action.

DISPOSITION

The order of dismissal is affirmed. Respondent is to have her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.